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SUPREME COURT, U. S.
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In the Supreme Court
of the United States

OCTOBER TERM, 1972

No. 72-276

FRANCES W. TAYLOR, individually and as Executrix of the Will of Guy H. Winslow, deceased,

Petitioner,

AGAINST

UNITED STATES OF AMERICA AND MYRTLE L. JARVEY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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In the Supreme Court
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No._____

FRANCES W. TAYLOR, individually
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UNITED STATES OF AMERICA AND
MYRTLE L. JARVEY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above entitled case on April 26, 1972, petition for rehearing and suggestion of appropriateness of rehearing in banc denied, June 6, 1972.

OPINIONS BELOW

The opinion of the Court of Appeals is not yet reported but it is set forth in the appendix hereof, p. 17. It affirmed the judgment of the United States District Court for the District of Oregon, not reported, dismissing the action brought by Frances W. Taylor, after the United States Veterans Administration had disallowed her claim for United States Government Life Insurance on the life of Guy H. Winslow. The opinion of the District Court and the administrative decision of the Veterans Administration are reproduced in the appendix hereof, pp. 20 and 23, respectively.

JURISDICTION

The judgment of the United States Court of Appeals was entered on April 26, 1972, petition for rehearing denied on June 6, 1972. Jurisdiction of this court is invoked under 28 U.S.C. Sec. 1254(1).[1]

QUESTIONS PRESENTED

1. Does a divorce decree sought and obtained by the named beneficiary of a United States Government Life Insurance policy, ordering and requiring her to

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[1] 28 U.S.C. Sec. 1254. COURTS OF APPEALS; CERTIORARI; APPEAL; CERTIFIED QUESTIONS.

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

waive and relinquish any claim which she might at the time of the divorce or in the future have as heir, legatee, devisee, creditor or otherwise against her husband, the insured veteran, operate as a release, relinquishment, or disclaimer of the beneficiary's expectancy in the insurance policy, as held by the Fifth Circuit; or is such a release, relinquishment, or disclaimer inoperative by reason of the statute prohibiting assignments by the beneficiary (with certain inapplicable exceptions), as held by the Ninth Circuit in the instant case?

2. Does the named beneficiary have any claim against the insurer, that is, the United States, which survives a relinquishment by her of any claim against the insured veteran?

STATUTES AND REGULATIONS INVOLVED

The federal statutes and regulations involved are as follows:

> 38 U.S.C. Sec. 749. CHANGE OF BENEFICIARY. "Subject to regulations, the insured shall at all times have the right to change the beneficiary or beneficiaries of a United States Government life insurance policy without the consent of such beneficiary or beneficiaries."
>
> 38 U.S.C. Sec. 753. ASSIGNMENTS. "Any person to whom United States Government life insurance shall be payable may assign his interest in such insurance to the spouse, child, grandchild, parent, brother, sister, uncle, aunt, nephew, niece, brother-in-law, or sister-in-law of the in-

sured. Insofar as applicable, the definitions contained in section 3 of the World War Veterans' Act, 1924, in effect on December 31, 1958, shall apply to this section."

38 U.S.C. Sec. 3101. NONASSIGNABILITY AND EXEMPT STATUS OF BENEFITS. "(a) Payments of benefits due or to become due under any law administered by the Veterans' Administration shall not be assignable except to the extent specifically authorized by law, and such payments made to, or on account of, a beneficiary shall be exempt from taxation, shall be exempt from the claim of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary. The preceding sentence shall not apply to claims of the United States arising under such laws nor shall the exemption therein contained as to taxation extend to any property purchased in part or wholly out of such payments. The provisions of this section shall not be construed to prohibit the assignment of insurance otherwise authorized under chapter 19 of this title, or of servicemen's indemnity."

38 C. F. R. Sec. 8.47. BENEFICIARY CHANGES. "The insured shall have the right at any time, and from time to time, and without the knowledge or consent of the beneficiary to cancel the beneficiary designation, or to change the beneficiary, but a change of beneficiary to a person not within the permitted class of beneficiaries set forth in Sec. 8.46 shall not be effective as to insurance which matured prior to August 1, 1946. A change of beneficiary to be effective must

be made by notice in writing signed by the insured and forwarded to the Veterans' Administration by the insured or his agent, and must contain sufficient information to identify the insured. Whenever practicable such notices shall be given on blanks prescribed by the Veterans' Administration. Upon receipt by the Veterans' Administration, a valid designation or change of beneficiary shall be deemed to be effective as of the date of execution: *Provided*, that any payment made before proper notice of designation or change of beneficiary has been received in the Veterans' Administration shall be deemed to have been properly made and to satisfy fully the obligations of the United States under such insurance policy to the exent of such payments."

STATEMENT OF THE CASE

Federal jurisdiction in the court of first instance

Jurisdiction of the District Court for the District of Oregon was invoked under 38 U.S.C. Sec. 784(a).[2]

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[2] 38 U.S.C. Sec. 784. SUITS ON INSURANCE.

"(a) In the event of disagreement as to claim, including claim for refund of premiums, under contract of National Service Life Insurance, United States Government life insurance, or yearly renewable term insurance between the Veterans' Administration and any person or persons claiming thereunder an action on the claim may be brought against the United States either in the United States District Court for the District of Columbia or in the district court of the United States in and for the district in which such person or any one of them resides, and jurisdiction is conferred upon such courts to hear and determine all such controversies. . . ."

Statement of the facts

This action concerns a contest over the proceeds of a United States Government Life Insurance policy, between Frances Taylor, daughter of the deceased veteran and executrix of his will, on the one hand, and Myrtle L. Jarvey, a divorced wife and the named beneficiary of the life policy, on the other.

Guy Winslow was the owner of a Government life insurance policy in the amount of $10,000 issued by the United States on July 1, 1927. In 1964, he designated Myrtle Winslow, then his wife, as the beneficiary. Myrtle obtained a divorce from Guy by decree of the Superior Court for Maricopa County, Arizona, entered March 28, 1968. The divorce decree made a distribution of the property of the parties, and further provided as follows:

> "4. That the plaintiff be and she hereby is ordered and required to waive and relinquish any claim which she may have against the defendant for payment of support, maintenance or alimony, and any claim which she may now or in the future have, as heir, legatee, devisee, creditor or otherwise against the defendant's estate.
>
> "5. That the plaintiff be and she hereby is ordered to turn over to the defendant all his personal papers, including but not limited to his Last Will and Testament and the trust agreement entered into with the Farmers and Merchants State Bank of Colby, Kansas."

Guy Winslow died on May 24, 1968, less than two months after the divorce. No change of beneficiary

was filed with the Veterans Administration after the divorce. After his death, the Government insurance policy was found among his personal effects. Myrtle remarried and became Myrtle Jarvey.

Frances Taylor made claim for the insurance proceeds on the Veterans Administration, as did also, at a much later date, Myrtle Jarvey. The Veterans Administration awarded the proceeds to Myrtle Jarvey. The District Court reached the same decision and dismissed the action. The Court of Appeals for the Ninth Circuit affirmed.

A collateral question of evidence may be involved, namely, the reliance by the trial judge on hearsay for an alternative ground for his decision. The Court of Appeals found it unnecessary to reach this question. This matter will be discussed in the argument.

REASONS FOR GRANTING WRIT OF CERTIORARI

Certiorari should be granted to resolve the conflict in decision between the Ninth Circuit and the Fifth Circuit on the same matter, relating to a frequently occurring question of public importance regarding the effect of divorce upon servicemen's life insurance.

The Court of Appeals for the Ninth Circuit stated that the question presented is, "Do federal statutes and regulations control problems involving the right of a beneficiary to recover on such a policy?" Petitioner does not dispute that *if* there is an applicable federal statute or regulation it will govern the problem. The real question, therefore, is this: *Is there* a

federal statute or regulation which prevents or prohibits the named beneficiary in a Government life insurance policy from *releasing or relinquishing* her interest?

The Court of Appeals held that the named beneficiary cannot *assign* her interest to the insured veteran because 38 U.S.C. Sec. 3101(a) prohibits assignment of payments of benefits due or to become due under any law administered by the Veterans' Administration, except to the extent specifically authorized by law, and the only authorization by law is 38 U.S.C. Sec. 753,[3] which does not name the insured as a person to whom the beneficiary may assign her interest.

The basic fallacy in the reasoning of the Court of Appeals for the Ninth Circuit is that the right of the insured veteran is never derived from the beneficiary. The insured veteran is the one who bought the policy and paid the premiums on it and owns the policy. On the other hand, the persons named in 38 U.S.C. Sec. 753 can only obtain a right in the proceeds of a veterans' Government life insurance policy by an assignment from the beneficiary. An assignment transfers, conveys, and assigns rights, and is, therefore, distinguishable from a relinquishment, which gives up or disclaims rights. The beneficiary has no rights which she can assign or transfer to the insured, but she does

---

[3] 38 U.S.C. Sec. 753. ASSIGNMENTS.

"Any person to whom United States Government life insurance shall be payable may assign his interest in such insurance to the spouse, child, grandchild, parent, brother, sister, uncle, aunt, nephew, niece, brother-in-law, or sister-inlaw of the insured. . . ."

have an expectancy which she can disclaim and release.

The Court of Appeals for the Ninth Circuit also held that the divorce decree did not effect a change of beneficiary, citing 38 U.S.C. Sec. 749, and 38 C.F.R. Sec. 847 (intending no doubt to cite Sec. 8.47), but petitioner has never contended that the divorce decree did effect a change of beneficiary.

The opinion of the Ninth Circuit cites an array of federal decisions as controlling the instant case, but it will be seen upon an examination of those decisions that *not one of them is in point.* They are as follows:

Wissner v. *Wissner*, 388 U.S. 655.

Held, in a contest between the veteran's widow and his mother, that National Service life insurance is not affected by the community property laws of California. This case did not involve a divorce at all.

Pack v. *United States* (9 Cir. 1949), 176 F.2d 770.

Held that the widow had no rights in the National Service life policy of her deceased husband by reason of the community property laws of California.

Fitzstephens v. *United States* (D. Wyo. 1960), 189 F. Supp. 919.

Held that a property settlement agreement incorporated in a divorce decree, whereby the parties agree that all life insurance on the life of the husband shall be his sole and separate prop-

erty, and each party releases the other from all rights or claims growing out of their marital relationship, is not effective as a change of beneficiary of a National Service life insurance policy. No contention of a release or relinquishment was presented to the Wyoming District Court.

Hoffman v. *United States* (9 Cir. 1968), 391 F.2d 195.

Held that the insured decedent had the right to change the beneficiary in his National Service Life policy, notwithstanding a Washington state court divorce decree ordering him to maintain the divorced wife as the sole beneficiary.

Suydam v. *United States* (D.C. Cir. 1968), 404 F.2d 1329).

Held that the first wife could not reach the proceeds of a National Service life policy naming the second wife as beneficiary, in order to satisfy a separation agreement between the insured veteran and his first wife whereby he promised to pay a stipulated sum as child support.

Kimball v. *United Sates* (6 Cir. 1962), 304 F.2d 864.

Held that an Ohio divorce decree, incorporating a separation agreement by which the veteran agreed to surrender his Government life insurance policy to his divorcing wife and to maintain it thereafter, could not be given effect in view of 38 U.S.C. Sec. 749, giving the insured the right at all times to change the beneficiary, and 38 U.S.C. Sec. 3101(a), prohibiting certain assignments.

Since there is no federal statute or regulation which prevents or prohibits the named beneficiary in a Government life insurance policy from releasing or relinquishing her interest, the only question remaining is, Did Myrtle relinquish her interest as the named beneficiary by means of the Arizona divorce?

O'Brien v. *Elder* (5 Cir. 1957), 250 F.2d 275, was a contest between the administratrix of the estate of the deceased veteran and his divorced wife as to the right to the proceeds of a National Service life insurance policy,[4] naming the insured's wife as beneficiary. The insured and his wife entered into a separation agreement in contemplation of divorce, whereby, without specifically mentioning any insurance, they agreed upon a division of the marital assets, and provided as follows:

> "That upon the performance of all the conditions contained in this stipulation, neither party hereto shall have any claim on the other party of any kind whatsoever, including that for alimony."

The insured veteran died three months after the divorce, without having made a change of beneficiary. The policy was found among his personal effects after his death. The Fifth Circuit held as follows:

> "The court below in granting summary judgment rejected the plaintiff's claim based upon the separation agreement because the stipulation makes no mention of insurance. The complete text of the agreement is reproduced in the margin. It

[4] For present purposes there is no distinction between Govenment life insurance and National Service life insurance.

is our view however, that while correctly determining that the construction of this agreement did not raise factual questions, the court erred in concluding that the agreement was not intended to and did not embrace the proceeds of the insurance policies. When we consider the condition of the parties, the object which they had in view and the nature of the agreement, all of which can be done within the four corners of the instrument itself, we think that it is plain that the defendant relinquished any interest in the proceeds of her husband's insurance.

". . . The comprehensiveness of the term 'claim' has been noted by the courts (see Baekgaard v. Carreiro, 9 Cir., 237 F.2d 459, certiorari denied 352 U.S. 1004, 77 S. Ct. 564, 1 L. Ed. 2d 549). We find in reading this paragraph in the light of the entire agreement and the object which it expresses, the intention by each party to release and relinquish any and all interests derived from or held as against the other." (250 F.2d 275 at 278-279)

The only distinction between *O'Brien* and the instant case is that *O'Brien* involved a National Service policy while this case involves a Government life policy, a distinction having no significance, and that in *O'Brien* the divorce decree did not require the wife to turn over to the husband his personal papers, while in the present case the divorce decree did contain such a provision. For convenient comparison of the two divorce decrees, the pertinent language is set forth below, side by side:

O'Brien	*Instant case*
". . . neither party hereto shall have any claim on the other party of any kind whatsoever, including that for alimony."	"That the plaintiff be and she hereby is ordered and required to waive and relinquish . . . any claim which she may now or in the future have, as heir, legatee, devisee, creditor or otherwise against the defendant's estate."

Since there is no provision of the federal statutes or regulations of the Veterans Administration controlling the problem, it would seem to be worthwhile to ascertain what some of the state courts have said relating to similar situations involving private life insurance. The following decisions hold that varying language in a property settlement agreement incident to divorce is sufficient to constitute a relinquishment of the wife's expectancy as the named beneficiary:

Sullivan v. *Union Oil Co., of California*, 16 Cal. 2d 229, 105 P.2d 922, 927:

> ". . . each of said parties hereby releases the other from any and all liabilities, debts, or obligations of any kind or character . . . including all claims of either party upon the other for support and maintenance as wife or husband or otherwise, it being understood that this instument is intended to settle the rights of the parties hereto in all respects, . . . The said parties hereto each hereby waive any and all right to the estate of the other left at his or her death. . . ."

Dudley v. *Franklin Life Insurance Company*, 250 Or. 51, 440 P.2d 363:

Similar to *Sullivan* v. *Union Oil*, supra.

Western and Southern Life Insurance Co. v. *Hague*, 74 Ohio L. Abs. 259, 140 N.E.2d 89, 90-91:

> "The said Alkie Davis hereby waives and releases all of the right, title and interest, including her right of dower, in any and all property, whether real or personal, now owned by the said Edward O. Davis . . ."

The holding of the Ninth Circuit in the instant case that, "Nothing in the divorce decree concerned relinquishment of Myrtle Jarvey's claim to the proceeds of the life insurance policy," is, therefore, not only in conflict with *O'Brien* v. *Elder* (5 Cir. 1957), 250 F.2d 275, but is contrary to the mainstream of authority, as well as its previous decision in *Tucker* v. *Brady* (9 Cir. 1962), 305 F.2d 550, 552, holding that this language in a property settlement agreement was sufficient to divest the wife of her expectancy as named beneficiary in her husband's pension plan:

> "That said parties hereto each hereby waives any and all right to the estate of the other at his or her death and forever quitclaims any and all rights to share in the estate of the other. . . ."

Effectiveness of relinquishment as to the United States

In holding that, "If she relinquished anything concerning the insurance, it was as to any claim against Winslow but not her claim against the insurer, the United States," the Ninth Circuit seems

to be reasoning that the beneficiary's right is a vested interest; but her interest during the lifetime of the insured is not vested; it is merely an expectancy. 38 U.S.C. Sec. 749;[5] *McCollum* v. *Sieben* (8 Cir. 1954), 211 F.2d 708, 712; *O'Brien* v. *Elder* (5 Cir. 1957), 250 F.2d 275, 279; *Kimball* v. *United States* (N.D. Ohio, E.D. 1961), 197 F. Supp. 124, 125, aff'd (6 Cir. 1962), 304 F.2d 864. If the named beneficiary's right is derived only from the insured, how could she relinquish that right against him without at the same time relinquishing that right against the insurer? If she relinquished her right against the insured, what would she have left upon which to base a claim against the insurer?

Reliance on hearsay evidence by trial judge

The opinion of the District Court (Appendix p. 20) alludes to extrinsic evidence, as an alternative ground for decision, consisting of an extract from the administrative decision where the Veterans Administration refers to a letter written to it by Myrtle Jarvey, in which she said:

> "Our divorce was an amicable one, and he told me many times that nothing would be changed in regard to his government life insurance."

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[5] 38 U.S.C. Sec. 749. CHANGE OF BENEFICIARY.
"Subject to regulations, the insured shall at all times have the right to change the beneficiary or beneficiaries of a United States Government life insurance policy without the consent of such beneficiary or beneficiaries."

The supposed letter is not a part of the evidence, because it was not offered in evidence, would not have been admissible if it had been offered, and is not mentioned in the agreed facts of the pretrial order. In any event, the purported self-serving declaration of Myrtle Jarvey proves nothing, because it is not clear whether what the Veterans Administration says that she said that the dead man said about his Government life insurance was said before or after the divorce.

CONCLUSION

If the Arizona divorce decree is sufficient to divest Myrtle Jarvey of her expectancy, it was not necessary for Guy Winslow to execute a change of beneficiary.

For the reason aforesaid, it is respectfully prayed that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRANCES W. TAYLOR, individually and as Executrix of the Will of Guy H. Winslow, deceased, *Plaintiff-Appellant,* vs. UNITED STATES OF AMERICA and MYRTLE L. JARVEY, *Defendants-Appellees.*	Nos. 26,250 and 71-2905 Apr. 26, 1972

Appeal from the United States District Court for the District of Oregon

Before: CARTER and HUFSTEDLER, Circuit Judges, and MURRAY, District Judge.*

PER CURIAM:

This action concerns a contest over the proceeds of a United States Government Life Insurance policy, between Frances Taylor, daughter of the deceased and executrix of his will, on the one hand, and Myrtle L. Jarvey, a divorced wife and the designated beneficiary of the life policy, on the other. The statutes involved are part of the 1958 revision of Title 38, U.S.C., entitled "Veterans' Benefits," particularly Chapter 19 thereof, Sections 701-88, and Chapter 53, P.L. 85-857, September 2, 1958, 72 Stat. 1105, et seq.

The question presented is—Do federal statutes and regulations control problems involving the right of a beneficiary to recover on such a policy? We hold they do.

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* Hon. William D. Murray, Senior District Judge, District of Montana, sitting by designation.

Winslow was the owner of a Government Life Policy in the sum of $10,000. In 1964 he designated Myrtle Winslow, then his wife, as beneficiary. No change of beneficiary was ever filed with the Government. Winslow and Myrtle were divorced in 1968. Winslow died two months later. Myrtle remarried and became Myrtle Jarvey, the appellee.

The divorce decree provided that Myrtle was ordered to "waive and relinquish any claim which she may have against defendant (Winslow) for payment of support, maintenance, or alimony, and any claim which she may now or in the future have, as heir, legatee, devisee, creditor or otherwise against the defendant's estate." Myrtle was also ordered "to turn over to the defendant all his personal papers. . . ." The record is otherwise bare of any evidence manifesting Winslow's intent to remove Myrtle as beneficiary.

The trial court rendered judgment for Myrtle Jarvey and Taylor appeals. We affirm.

The federal statutes and other regulations control questions as to the right to recover under United States Government Life policies. *Wissner* v. *Wissner*, 338 U.S. 655 (1950) (involving a National Service Life Insurance policy, and National Service Life Insurance Act of 1940, 54 Stat. 1008, amended). "There is . . . a marked distinction between the criteria for judicial construction of an ordinary commercial life insurance contract, and construction of the provisions of an act of Congress setting up a system of national

life insurance for servicemen to be administered by a governmental agency" *United States* v. *Zazove*, 334 U.S. 602, 610 (1948) (involving National Service Life Insurance Act of 1940, *supra.*)

The various cases cited by the parties involving commercial life insurance policies do not control this case. On the contrary, this case is controlled by 38 U.S.C. §§ 749, 3101(a),[1] 38 C.F.R. § 847 and the federal cases. *Wissner* v. *Wissner, supra; Pack* v. *United States* (9 Cir. 1949) 176 F.2d 770; *Fitzstephens* v. *United States* (D. Wyo. 1960) 189 F. Supp. 919;[2] *Hoffman* v. *United States* (9 Cir. 1968) 391 F.2d 195; *Suydam* v. *United States* (D.C. Cir. 1968) 404 F.2d 1329; and *Kimball* v. *United States* (6 Cir. 1962) 304 F.2d 864.[3]

O'Brien v. *Elder* (5 Cir. 1957) 250 F.2d 275, relied on by appellant did not even cite *Wissner, supra*, decided in 1950, and is contra to the array of authority above.

In our case, the divorce decree did not effect a change of beneficiary. Nothing in the divorce decree concerned relinquishment of Myrtle Jarvey's claim

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[1] 38 U.S.C. 3101(a) reads in part, —

"Payments of benefits due or to become due under any law administered by the Veterans' Administration shall not be assignable except to the extent specifically authorized by law. . . ."

[2] These cases were decided under the National Service Life Insurance Act of 1940, *supra.* Congress, by P.L. 85-857, September 2, 1958, 72 Stat. 1105, revised, codified and enacted into law Title 38 U.S. Code. No substantial changes were made in the 1958 Act insofar as our problem is concerned.

[3] Cases decided under the 1958 Act, note 2, *supra.*

to the proceeds of the life insurance policy. If she relinquished anything concerning the insurance, it was as to any claim against Winslow but not her claim against the insurer, the United States.

We do not reach appellant's contention that the trial judge relied on alleged hearsay for an alternative ground for his decision.

Judgment affirmed.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

FRANCES W. TAYLOR, individually and as executrix of the Will of Guy H. Winslow, deceased, *Plaintiff*,	Civil No. 69-227
vs.	OPINION
UNITED STATES OF AMERICA and MYRTLE L. JARVEY, *Defendants.*	June 17, 1970

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRANCES W. TAYLOR, individually and as Executrix of the Will of Guy H. Winslow, deceased, *Plaintiff-Appellant,* v. UNITED STATES OF AMERICA and MYRTLE L. JARVEY, *Defendants-Appellees.*	Nos. 26,250 and 71-2905

ORDER DENYING PETITION FOR REHEARING AND REJECTING SUGGESTION FOR HEARING IN BANC

The panel to which the case was assigned having voted to deny the petition for rehearing and to reject the suggestion for hearing in banc; and all the judges in active service having been supplied with copy of the suggestion for hearing in banc, and no judge having voted to hear the case in banc,

IT IS ORDERED that the petition for rehearing is denied and the suggestion for hearing in banc is rejected.

SOLOMON, Judge:

Plaintiff Frances W. Taylor and defendant Myrtle L. Jarvey assert conflicting claims to the proceeds of a Government Life Insurance Policy. The case was submitted on the record. Jurisdiction is under 38 U.S.C. § 784.

Guy H. Hinslow was the insured *and owner* of a Government Life Insurance Policy. In 1964, Winslow designated defendant, his wife, as beneficiary.

On March 28, 1968, defendant divorced Winslow. The divorce decree contained a property settlement which provided in part:

> "4. That the Plaintiff be and she hereby is ordered and required to waive and relinquish any claim which she may have against the Defendant for payment of support, maintenance or alimony, and any claim which she may now or in the future have, as heir, legatee, devisee, creditor or otherwise against the Defendant's estate.
>
> "5. That the Plaintiff be and she hereby is ordered to turn over to the Defendant all of his personal papers . . . ."

Winslow died on May 24, 1968, without changing the beneficiary of his policy.

Plaintiff, as executrix of Winslow's will, filed a claim for the insurance proceeds, on the theory that defendant, by the divorce settlement, relinquished any interest she had under the policy.

Defendant, as the designated beneficiary, also filed a claim for the policy proceeds.

Plaintiff offered no evidence other than the divorce decree to show that either defendant or Winslow intended that defendant should relinquish her interest under the policy. Plaintiff did submit, as an exhibit, a copy of the administrative decision awarding the proceeds to defendant. That decision contains the following paragraph:

> "January 27, 1969: Myrtle L. Jarvey wrote a letter enclosing claims forms . . . . Mrs. Jarvey continued 'Our divorce was an amicable one, and he told me many times that nothing would be changed in regard to his Government Life Insurance."

The divorce decree and the administrative decision are the only evidence on Winslow's and defendant's intent at the time of the decree.

I find that defendant is entitled to the policy proceeds.

Plaintiff cites several cases to support her contention that defendant relinquished her interest under the policy. These include *O'Brien* v. *Elder*, 250 F.2d 275 (5th Cir. 1957), and *Stone* v. *United States*, 272 F.2d 746 (5th Cir. 1959), involving Government insurance policies; and *Tucker* v. *Brady*, 305 F.2d 550 (9th Cir. 1962), and *Aetna Life Ins. Co.* v. *Bushnell*, 190 F. Supp. 499 (D. Wyo. 1960), involving private insurance policies.

Defendant cites *Mayberry* v. *Kathan*, 232 F.2d 54 (D.C. Cir. 1956), involving a private insurance policy; and *Fitzstephens* v. *United States*, 189 F. Supp. 919 (D. Wyo. 1960), involving a Government policy.

These cases are not in point. In some of them, there was no evidence of intention except for the property settlement agreement. In others, there was extrinsic evidence that the insured intended that the beneficiary should relinquish her rights.

Here, the property settlement contained general language. It did not refer to the insurance policy. The only extrinsic evidence of intent is the administrative decision's quotation from defendant's letter: "Our divorce was an amicable one, and he told me many times that nothing would be changed in regard to his Government Life Insurance."

Even without this letter, I find that defendant is entitled to the proceeds of the policy.

This opinion will constitute findings of fact and conclusions of law under Rule 52(a), Fed. R. Civ. P.

Dated this 17th day of June, 1970.

GUS J. SOLOMON
United States District Judge

UNITED STATES VETERANS ADMINISTRATION

FK 68 55 58
XC 246 729

VA Center
Philadelphia, Pa. 19101

WINSLOW, Guy H.
310/297D

ADMINISTRATIVE DECISION

ISSUE:

Entitlement of United States Government Life Insurance proceeds. Is Frances W. Taylor, individually,

Frances W. Taylor as executrix of the estate of Guy H. Winslow, or, Myrtle R. Jarvey, the sole principal beneficiary of the insurance proceeds?

FACTS:

The insured, on the date of his death, May 24, 1968, owned a $10,000 Whole Life policy.

June 15, 1927: The insured applied for a $10,000 United States Government Life Insurance policy upon which he designated as his beneficiary; *wife, Alta S. Winslow,* $10,000.

December 8, 1936: The insured directed that his insurance proceeds be paid in 120 monthly installments.

June 5, 1952: Insured forwarded a copy of a property settlement between Alta S. Winslow and Guy H. Winslow, asking that it be placed on file.

July 2, 1952: In response to the insured's letter of June 5, 1952, the Veterans Administration by letter stated "There is no provision under a United States Government Life Insurance contract whereby an insured may make an irrevocable beneficiary designation nor may he be deprived, by agreement or otherwise, of any of the rights reserved to him under his policy including the right to surrender

the policy for cash value, if such value exist, to permit the policy to lapse, or to change the beneficiary at any time and from time to time as he sees fit, without the knowledge or consent of the current beneficiary." "Under existing legislation, and the terms and conditions of your policy, the Veterans Administration is without authority to recognize a property settlement in connection with United States Government Life Insurance, so the copy of the settlement is returned for your disposition."

October 8, 1952: The insured obtained a divorce from Alta S. Winslow.

April 27, 1960: Form 9-336, Change of Beneficiary, was received from the insured upon which he designated beneficiaries as: Principal beneficiary, Frances W. Taylor, daughter, one hundred percent, 2 - 96 months; contingent beneficiary, Jean Taylor, granddaughter, one hundred percent, 2 - 96 months.

May 28, 1964: Letter was received from the Veterans Service Officer, Jackson

County, Medford, Oregon, enclosing VA Form 9-336, Change or Designation of Beneficiary, named as sole principal beneficiary, *Myrtle L. Winslow, wife*, all, Option 1.

September 20, 1965: Letter received from the Veterans Service Officer, Medford, Oregon, which stated that they had assisted Mr. Winslow in completing his change of beneficiary. May 18, 1964 was the only contact they had with the insured. Form 9-336 was mailed to the Veterans Administration in St. Paul.

June 18, 1968: Claims forms received from Frances W. Taylor

June 26, 1968: Frances W. Taylor was informed that she was not the named beneficiary and gave her 30 days to submit evidence to the contrary, also, if she does not respond within the time, her claim would be considered withdrawn.

July 12, 1968: Letter was received from Attorney Fred A. Granata, which enclosed a copy of the divorce decree and property settlement in Guy H. Winslow versus Alta S. Winslow. The letter stated that

Alta S. Winslow had been dead several years and that his client, Frances W. Taylor, daughter of the insured, was the irrevocable contingent beneficiary.

July 17, 1968: Attorney Granata was informed as to the Veterans Administration's position on the insured's right to change his beneficiary.

July 19, 1968: Attorney for Frances W. Taylor informed the Veterans Administration that his client protested payment to Myrtle L. Winslow.

July 25, 1968: Attorney Granata's letter is on behalf of the insured's daughter individually and as executrix. Letters Testamentary were enclosed. He further advised that in the event of denial of his client's claim, they would resort to the courts for equitable relief.

December 5, 1968: Report of Field Examination located the last designated beneficiary, Myrtle L. (Winslow) Jarvey.

January 20, 1969: Letter from Attorney Granata making claim on behalf of Frances W. Taylor individually. He further stated that the prior claim was made for her as executrix.

January 27, 1969: Myrtle L. Jarvey wrote a letter enclosing claims forms, service discharge of Guy Winslow and photostats of three letters of correspondence between Spencer and Spencer, Attorneys for the insured, and Fred Granata, Attorney for Frances W. Taylor. Mrs. Jarvey continued "Our divorce was an amicable one, and he told me many times that nothing would be changed in regard to his Government Life Insurance.

CONTENTIONS OF THE PARTIES:

It is contended by Frances W. Taylor, that the insured was, pursuant to the terms of the divorce decree, prohibited from changing the beneficiary of his United States Government Life Insurance. Frances W. Taylor further contends that she, as surviving irrevocable contingent beneficiary, should receive all the United States Government Life Insurance proceeds of Guy H. Winslow. In the alternative, claim was filed by the executrix of the estate of the insured.

Myrtle L. Jarvey claims that the insured changed his beneficiary so that she would receive the proceeds, and that the insured told her "that nothing would be changed in regard to his Government Life Insurance."

DISCUSSION AND EVALUATION:

There is no provision under a United States Gov-

ernment Life Insurance contract whereby an insured may make an irrevocable beneficiary designation nor may he be deprived, by agreement or otherwise, of any of the rights reserved to him under his policy including the right to surrender the insurance for cash value, or to change the beneficiary at any time and from time to time as he may see fit, without the knowledge or consent of the current beneficiary.

The insured may at any time, without the beneficiary's knowledge or consent, cancel or change his beneficiary designation by notice in writing signed by him and forwarded to the Veterans Administration by the insured or his agent. Upon receipt by the Veterans Administration, a valid designation or change of beneficiary will be effective as of the date of execution. (CFR 8.47)

Payments of benefits due or to become due under any law administered by the Veterans Administration, shall not be assignable except to the extent specifically authorized by law—, 38 U. S. Code Section 3101.

The insured shall have the right to designate the beneficiary or the beneficiaries of insurance maturing on or after August 1, 1946, and shall, subject to regulations, at all times have the right to change the beneficiary or the beneficiaries of such insurance without consent of such beneficiary or beneficiaries. (Title 38, U. S. Code, Section 717(a)).

The beneficiary designation shall be made by notice in writing to the Veterans Administration, signed

by the insured. (Title 38, Code of Federal Regulations, Section 8.46(b)).

Standing alone, the agreement between the insured and his divorced wife, which she was to be designated as irrevocable principal beneficiary, and under which Frances W. Taylor, was to be designated as irrevocable contingent beneficiary, is an assignment, prohibited by Section 3101, Title 38, U. S. Code.

"An insured cannot effectively contract away his right to change the beneficiary of his Government Life Insurance policy, the widow, as named beneficiary, was entitled to the proceeds, notwithstanding a separation agreement which required him to surrender the policy to his former wife." Kimball v. US, CA Ohio 1962, 304 F. 2d 864.

A property settlement incorporated in a divorce decree, which obligated the insured to designate his son as beneficiary, did not constitute a sufficient overt act toward accomplishing a change of beneficiary, and the son could not recover against the named beneficiary. Fleming v. Smith, Washington. 1966, 418 P. 2d 147.

By opinion of March 13, 1968, the United States Court of Appeals for the 9ith Circuit, in Hoffman v. United States of America and Pearl L. Lecher, No. 21,959, confirms the award of proceeds from National Service Life Insurance policies to the named beneficiary, notwithstanding a divorce decree that "he designate, keep and maintain his former wife as sole beneficiary during her lifetime." The Court's opinion

"The Supreme Court of the United States in Wissner v. Wissner, 338 US 655 (1950) that

> "The controlling section of the act provides that the insured shall have the right to designate the beneficiary of the beneficiaries of the insurance—and shall—at all times have the right to change the beneficiary or beneficiaries -- Thus, Congress has spoken with force and clarity in directing that the proceeds belong to the named beneficiary and no other. Pursuant to the Congressional command, the Government contracted to pay the insurance to the insured's choice."

CONCLUSION:

Myrtle L. (Winslow) Jarvey is the beneficiary of the insured's United States Government Life Insurance. The claim of Myrtle L. Jarvey is allowed. The claim of Frances W. Taylor individually, and as executrix of the estate of Guy H. Winslow, is disallowed.

REASONS FOR DECISION:

The insured executed a change or designation of beneficiary form 9-336 on May 18, 1964. The beneficiary designation naming Myrtle L. Winslow as the sole principal beneficiary met all of the mechanical requirements for a change of beneficiary.

An insured may at any time name or change a beneficiary without notice to the prior beneficiary, and an irrevocable designation is prohibited by Section 3101, Title 38 US Code.

Submitted by: /s/ *L. C. Coffelt* Date 3/4/69

Concurred in: /s/ *R. N. Leows* Date 3/21/69

Approved by: /s/ *C. A. Corley* Date 3/21/69

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72-276

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MICHAEL RODAK, JR., CLERK

In the Supreme Court
of the United States
OCTOBER TERM, 1972

No.....

FRANCES W. TAYLOR, individually and as Executrix of the Will of Guy H. Winslow, deceased,

Petitioner,

v.

UNITED STATES OF AMERICA and MYRTLE L. JARVEY,

Respondents.

BRIEF IN OPPOSITION TO GRANTING WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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BRIEF IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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UNITED STATES OF AMERICA and MYRTLE L. JARVEY,

Respondents.

BRIEF IN OPPOSITION TO GRANTING WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Respondent Myrtle L. Jarvey prays that the petition for certiorari in the above-entitled case be denied.

OPINIONS BELOW

Omitted pursuant to Supreme Court Rule 40(3).

JURISDICTION

Omitted pursuant to Supreme Court Rule 40(3).

STATUTES AND REGULATIONS INVOLVED

Omitted pursuant to Supreme Court Rule 40(3).

QUESTION PRESENTED

Can a state court divorce decree affect an insured's right to designate the beneficiary of his life insurance under the National Service Life Insurance Act?

STATEMENT OF THE CASE

Respondent, Myrtle L. Jarvey, is not satisfied with the statement of the facts as prepared by Petitioner; therefore, the following statement of the facts and narrative is presented in supplement thereof:

The Arizona divorce decree between the now deceased insured and his beneficiary, the Respondent, Myrtle L. Jarvey, provided *inter alia* that:

> ". . . the plaintiff [beneficiary herein] be and she is hereby ordered and required to see that the day-to-day personal needs of the defendant [insured] are taken care of, including but not limited to seeing that the defendant is placed in an adequate nursing home. . . ."

The Petitioner-executrix herein, Frances W. Taylor, acting under a power of attorney for the insured, signed and approved the above decree. No mention was made therein respecting termination of the Respondent-beneficiary's status under the National Service Life Insurance policy in question. The record is devoid of any evidence manifesting the insured's intent to remove her as beneficiary.

ARGUMENT IN OPPOSITION TO GRANTING WRIT OF CERTIORARI

Certiorari should not be granted because the decision of the Ninth Circuit is correct and supported by an array of non-conflicting federal authority directly on point.

Petitioner contends that a conflict exists in decisions between the Ninth Circuit and the Fifth Circuit on the question which is at issue here. Respondent submits that no such conflict exists.

O'Brien v. *Elder*, 250 F.2d 275 (5th Cir. 1957), the Fifth Circuit case upon which Petitioner relies, is clearly distinguishable from the instant case in that it involved a property settlement agreement while the instant case does not. The *O'Brien* opinion is framed in terms of that property settlement agreement. Moreover, the language in that opinion is on its face much broader than that which is at issue here and was obviously given great weight by the divided court.

However, notwithstanding the distinguishable features of *O'Brien* v. *Elder*, *supra*, it cannot go unnoticed that that case stands alone against the great weight of authority and that the leading case among these, *Wissner* v. *Wissner*, 338 U.S. 655 (1950), was not even cited in *O'Brien* v. *Elder*, *supra*, even though it was decided seven years earlier.

In *Wissner*, *supra*, this Court declared that:

> ". . . Congress has spoken with force and clarity in directing that the proceeds belong to the named beneficiary and no other." At page 658.

Other significant cases supporting the authority of *Wissner, supra,* and the decision of both the District Court and the Court of Appeals in the subject case include *Hoffman* v. *United States,* 391 F.2d 195 (9th Cir. 1968). There the Ninth Circuit held that the insured decedent had the right to change the beneficiary on his National Service Life Insurance policy notwithstanding a state divorce decree ordering the insured to maintain his former wife as the sole beneficiary. Similar holdings, awarding such proceeds in accordance with the beneficiary designation at the time of the insured's death and overriding state divorce decrees similar to the Winslows', may be found in *Heifner* v. *Soderstrom,* 134 F. Supp. 174 (N.D. Iowa 1955), *Kaske* v. *Rothert,* 133 F. Supp. 427 (S.D. Cal. 1955), *Eldin* v. *United States,* 157 F. Supp. 34 (S.D. Ill. 1957), *Fitzstephens* v. *United States,* 189 F. Supp. 919 (D. Wyo. 1960), *Kimball* v. *United States,* 304 F.2d 865 (C.A. 6, 1962) and *Suydam* v. *United States,* 404 F.2d 1329 (D.C. Cir. 1968).

However, even without the persuasive support of these cases, the plain language of the pertinent regulation, 38 C.F.R. § 8.47, makes clear that the insured can make an effective beneficiary change only ". . . by notice in writing signed by the insured and forwarded to the Veterans Administration. . . ." Moreover, 38 U.S.C. §§ 753 and 3101(a) by omission prohibit the beneficiary from assigning his (her) interest in such insurance to the insured.

CONCLUSION

Winslow did not make an effective beneficiary change in writing through the Veterans Administration and the statutes do not allow the beneficiary to assign her expectancy interest in the policy proceeds to the insured.

Therefore, it is respectfully prayed that the petition for writ of certiorari be denied.

Respectfully submitted,

PHILIP A. JOSS
JOHN D. BURNS
Of Attorneys for Respondent

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-276

FRANCES W. TAYLOR, ETC., PETITIONER

v.

UNITED STATES OF AMERICA, AND MYRTLE L. JARVEY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

1. Petitioner is the daughter and executrix of the estate of Guy Winslow, a veteran who died in May 1968. She challenges the determination of the Veterans Administration awarding the proceeds of Winslow's $10,000 Government Life Insurance policy to respondent Mrs. Jarvey, who was the named beneficiary of the policy. The complaint was based upon the fact that, two months before his death, Mrs. Jarvey had obtained a divorce from Winslow in a court decree directing her "* * * to waive and relinquish any claim which she may have against the Defendant for payment of support, maintenance or alimony, and any claim which she may now or in the future have, as heir, legatee, devisee, creditor or otherwise against

477-695—72

the defendant's estate" (Pet. App. 21).[1] Petitioner argues that the effect of the decree was to require Mrs. Jarvey to relinquish any claim to the proceeds of the policy.

The district court (Pet. App. 20–23) upheld the Veterans Administration's determination allowing the claim of Myrtle L. Jarvey (Pet. App. 23–31) and the court of appeals affirmed *per curiam* (Pet. App. 17–20).

2. There is no reason for further review. The provisions of the divorce decree upon which petitioner relies do not expressly, or by implication, relate to the insurance policy. Moreover, petitioner does not contend that, apart from the decree, Winslow had manifested any intention to change the beneficiary of the policy. As the Veterans Administration pointed out in its decision (Pet. App. 24–25), Winslow had been informed some years earlier (when he had divorced a previous wife) that the Veterans Administration is without authority to effect a change of beneficiary upon the basis of a property settlement. Notwithstanding this advice, Winslow did not attempt to change the named beneficiary after his divorce from Mrs. Jarvey.[2]

---

[1] The divorce decree also required Mrs. Jarvey "to turn over to [Winslow] all his personal papers * * *" (Pet. App. 21).

[2] Contrary to petitioner's contention, the holding below does not conflict with any other decision. The resolution of a dispute of this nature necessarily depends upon the facts and circumstances of the particular case. The court's decision in *O'Brien* v. *Elder*, 250 F.2d 275 (C.A. 5), on which petitioner relies, turned upon the court's view of "the condition of the parties, the object which they had in view and the nature of the [settlement] agreement * * *." 250 F.2d at 279.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

SEPTEMBER 1972.

U.S. GOVERNMENT PRINTING OFFICE: 1972